

Judicial Approaches on Sex Offenders

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ARTICLE DETAILS

Article History

Published Online: 15 April 2019

Keywords

Sex offenders, Sex Offenders Registry, Law Commission of India, offence against body, supreme court.

ABSTRACT

India is apparently a country where women or girls are treated as 'Goddesses'. But when it comes to the protection and soundness of that 'Goddess', why are we among the least bothered lot of people. This article encapsulates all the aspects of sexual offenders, various types of sexual offences, the lacunas of the existing laws in our country and also the solutions that are the need of the hour. In India, every 25 minutes, at least one woman or girl is raped. Mostly, our mornings start with a coverage of either rape or some other crimes against women and it has become pretty common. So much so that we normally don't even pay heed to those news and end up overlooking them. This article includes the reasons behind increasing violence against women. It will also focus on the present situation of women in India and will analyze the ratio of delinquency or offence or misconduct against women as per the reports of National Crime Records Bureau. This includes the various laws on violence against women and their amendments. The article also throws or puts light on the Sex Offender Registry which is a recent addition in the existing legislation of India. This article is well furnished with both the old and recent case laws.

1. Introduction

A sex offender, sexual offender, or sex abuser is basically any individual who has supposedly committed or done a crime involving a sexual act. In legal words, a sex offender is an individual who is convicted of a sexual misdemeanor or wrongdoing. Sexual offence¹ encapsulates the crimes such as rape, sodomy, sexual abuse etc. Rape is described as sexual contact with an individual by coercion or sexual intercourse/contact/relationship with a person who is actually incapable of giving consent either because of being physically feeble or mentally incompetent or a sexual intercourse with an immature or juvenile person. Sodomy is quite analogous to rape other than the fact that it involves quite alike components of force or lack of consent or assent, however it involves sexual contact rather than intercourse/physical contact or diverge or different sexual acts.² Every State has different laws against sexual offences and every State has Statutes for sex offenders. These Statutes apply to the persons who have been found guilty of some sort of sexual crimes as described statutorily. For women in India, the last century has marked a great amount of progress but at times it has been as stubborn as in all the other centuries. In the world where women are supposedly to be treated equal to men and that too with complete dignity and respect, we keep coming across the rape incidents almost daily in our newspapers and television sets. Over a few years now, it has been impossible to see the term India³ without a news of violence against women accompanying it. The definition of sexual offender is 'a generic term for persons convicted of crimes including sex, including rape, severe sexual harassment or torture, molestation and pornographic production or distribution.'⁴

2. Causes That Leads To Rise In Sexual Offences

One of the very first questions that arises in our minds when we talk about rape or sexual offences is that what actually causes these actions of violence against women. Why are rapes and sexual offences increasing at an alarming rate? What are the lacunas in the present legal approach of our country to deal with the sexual offenders? Women do not seem to be safe inside their homes nor outside. In fact a major number of the rapes and sexual offenders reported are reported to have taken place inside their houses and are committed by their own family members or friends or neighbors.⁵ Following are some causes.

- i) Lack of public safety- women are not safe anywhere. Neither inside their homes nor outside.
- ii) Dearth of police officials and female officials- reports show that victims tend to report sex crimes more probably on the availability of women officers as it is easier for her to express her condition because the shortage or unavailability of female police officers further worsens or fans the flames of the problem.
- iii) Lethargic Judicial System of India- the Indian courts are painfully slow in dealing with the cases related to offences against women. and for the cases that do not get reported, the conviction rate is way less than 26% because the accused is not convicted. The others think it to be an easy escape after breaching the modesty of women. In a way the horrendous criminals or sexual offenders get encouraged to commit sex related crimes.⁶
- iv) Stigmatizing and pressuring the victim- after being victimized, the victim is stigmatized from the society. People start treating her as if she was the one at fault. Moreover, in rural areas and also in urban set ups, the

¹Section 40, Indian Penal Code, 1860

²Smith & Hogan, *criminal law* (10th ed).

³Section 18, Indian Penal Code, 1860

⁴Nolo's Plain English Law Dictionary

⁵ According to National Crime Report Bureau, 2013

⁶ *From attire to assault: clothing, objectification and dehumanisation - a possible prelude to sexual violence?* Awasthi B, 2017

victim is kind of pressurized to drop the charges against the guilty because of their influential reach or family backgrounds. As if this wasn't enough of torture on the victim, she is also pressurized to marry her rapist because nobody is going to marry her after her rape and it will bring dishonor and disrespect to the family.⁷

- v) Traditional gender roles prescribing female submission and male domination is also a major cause.⁸
- vi) Sadistic behavior in men is also a cause of increasing sexual hostility or wrongs against the women.
- vii) When a woman says no to sex, the man fears rejections and he won't be masculine anymore. So to prove his masculinity he rapes the woman. Such sick and sadistic thinking is a major cause.
- viii) Insufficient punishments to sexual offenders is a huge cause of sexual violence against women because there is not much deterrent effect on the other offenders and criminals.⁹

3. Cases of sexual offences in india

3.1 *Dhananjay Chatterjee v state of west Bengal*¹⁰

It was the time in mid 1970s when the country was developing legal provisions for the prevention of sexual offences and the case was a setback to the already crawling development when a school guard raped a seven year old school going girl and brutally murdered her by breaking her color bone and inflicting several fatal injuries to hide his crime. It was hard for the country and the jural system to believe that the people on whom the duty of protection and preservation lies can roll down to such heinous crimes against children.

3.2 *State v. jasbeer singh*¹¹ also known as Ranga Billa murder case

The time when the reformatory theories were settling into the vents of Indian jural system and it was the time of reformation for the jural system as well as for the people of the country. The progress was at a hike when the country saw brutal murder of two minor children of same family by hardcore criminals who were out on bail. The countrymen and the law makers were forced to rethink whether the path of reformation was worth another such case.

3.3 *Mukesh and anr v NCT of delhi and others*¹² also known as Damini murder case.

When Delhi was in deep sleep, a daughter was being raped brutally by a quintet of drunk youngsters in a moving bus and humanity was ashamed of those inhumans when they pushed the girl out of the moving bus and left her naked on the chilling roadside to die and face her destiny. Yes, it was her mistake because she was a girl and yes it was her destiny because she was travelling late night in a patriarchal society which is a crime and for what she was punished brutally.

⁷Violence against women: a priority health issue, Geneva, world health organisation, 1997

⁸Hostility towards women and victim empathy in rapists, Marshall WL, 2001

⁹War on women- time for action to end sexual violence in conflict, Nobel women's initiative, May 2011

¹⁰AIR 1994 SC

¹¹ILR 1979 Delhi 571

¹²Decided on 2013

4. Sex Offender Registry

A Sex Offender Registry, is supposedly that arrangement or approach which is specially designed to allow the Government establishments to keep a track on the sex offenders and their activities which includes those also who have finished or are done with their criminal punishments. India has become the ninth nation to have a sex offender registry. It is a very beneficial database which is accessible only by the law enforcement authorities. The entries include the photos, fingerprints, address and name of the sex offenders. An illustration as tweeted by the Women and Child Development Ministry said that it would now include samples of DNA and PAN and Adhar numbers.¹³ The newly inducted system is proving to be very useful in today's time in our country. Although the database is presently not accessible by public but only by the law making authorities, this system helps the police and other investigation agencies to keep an eye on the already booked sex offender in any part of the country. This database currently contains data of a total of 4.5 lakh sex offenders with their names, addresses, fingerprints and other necessary details. This database is to be preserved and upheld by the statistic agency of the country under three categories – those posing low danger to community, moderate danger and serious danger. A first time wrongdoer will see his name on this record for fifteen years from the date of registration of his offence, while for repeated offenders, it is twenty five years.¹⁴

According to the Police Data, there has been a substantial/noteworthy increase in the number of the reported rape cases in 2018. The recent data released by the Delhi Police which is under the Central Government, shows an increase in the number of reported rape cases this year, while the conviction rate is has decreased in the same time period. As compared to the number of cases in 2017 upto May 15, data shows an increase of 3.03% in the number of rapes that were reported in Delhi. However, the data of conviction rates for the years 2017 and 2018.¹⁵

5. Sexual offences under existing legal system in India

The law on sexual crimes is not only a few sentences but is a whole book, which has evidently described the whole legal provision in India.

5.1 *Provision under Indian Penal Code (herein after referred to as IPC)*

Section- 375 of IPC gives an exhaustive definition of 'rape' in following words: "A person is said to commit rape" who, except in the case hereinafter excepted has sexual intercourse with a women.

A further upgrading in the law relating to sexual offences can be seen in the provisions of S 228-A in I.P.C, which was presented by the Criminal Law (Amendment) Act, 1983 which explains regarding the disclosure as to identity of the victims of sexual offences as in Secs. 376, 376-A, 376-B, 376-C and 376-D, I.P.C.

Section- 223 not only protect the honour of sexually victimized women but also make it possible for them to depose in Court without having to worry of social ostracism.¹⁶

¹³www.thequint.com/voices/opinion/india-sex-offenders-registry-pros-and-cons, last visited on 28th January 2019.

¹⁴ National Crime Report Bureau, 2013

¹⁵As reported by *Hindustan times*, on september 20, 2018, last visited 30th January 2019.

¹⁶Indian Penal Code, 1860

5.2 Provision under Criminal Procedure Code, 1973

Another important procedural development of law relating to sexual offences can be seen in amendment of Sec-327 (2) of the Cr.P.C.¹⁷ Section 327 (2) of Cr.P.C talks about camera trial or trial under camera proceedings where the proceeding are not open to public and the concerned parties of the case.¹⁸ Here in the section further sub-sections (2) and (3) are added. Section-327 of the Cr.P.C. deals with the rights of the suspects or the accused to an open trial but also taking into account the difficulties confronted by the rape victims in open Court, the new sub-sections were inserted.¹⁹

5.3 Provision under Indian Evidence Act, 1872.

The Criminal Law (Amendment) Act, 1983 made a major modification in the procedural law by adding Sec-114-A to the Indian Evidence Act that consents drawing a decisive conjecture related to the lack of assent in some trials for rape including guardians or custodians. Under Section 114-A is concerned only to those cases that fall under S- 376 (2) I.P.C. and not to the cases which fall under S- 376 (1) I.P.C. Where in a case of gang rape there was inexplicable interruption of nine days in lodging the complaint, the victim wanted to marry one of the accused ones, the victim reluctantly made the report under her parent's pressure and the unconstrained report of the chemical examiner contradicted the story of sexual intercourse, it was held that assumption under S-114A was not involved. It was held that the non-appearance of injuries or wounds on the person of the accused or the prosecutrix, the victim of rape, is not per se sufficient to indicate her consent.

6. Recommendation of law commission of India regarding sexual offences

In the recent years, the influence of the criminal justice system on victims of rape and other sexual offences has had extensive attention, both in legal spheres and amongst organizations and individuals associated with the welfare of women. In criminology, an intensifying interest is shown in the victim and his or her place in the criminal justice system. As a result, better attention is now being paid to the female victim of a sexual offence or wrongdoings. For quite some time now the psychologists have been studying the influences or effects of rape and other sexual offences upon the women or girls and their behaviours.

In view of the recent deliberations which have taken place in the press and on some other platforms by viewing the insufficiency of the law to safeguard the women who have been victims of rape or assaults on their modesty. Government has ordered the Law Commission to do a distinctive and broad study of all the laws relating to rape. Government has also asked the Commission to keep in mind certain materials appropriate to the subject, which was mentioned in the letter of reference, and forwarded to the Commission by a supplementary letter. The material so dispatched includes a letter which was addressed by a woman Member of Parliament, a cutting of newspaper comprising report of a meeting in which certain recommendations for the reforms

were made, an extract from the I.P.C. Amendment Bill, as also certain administrative instructions issued by the Government of India in the Ministry of Home Affairs on the topic of arrest and questioning or interrogation of women.

It has been proposed or recommended in the letter of reference that the study should not only cover the practical law relating to rape, but also the rules of evidence and procedure and other correlated issues. The Commission has been asked to put forward its report within as short a time span as possible. Besides the reference made by the Government, the Commission has also received a suggestion for considering certain changes in the law of rape. The points made in the suggestion have been duly considered by the Commission.

The Commission has also made an attempt to ascertain the views of organizations interested in the subject, as also of one of the Members of Parliament who had in a letter addressed to the Government suggested reforms on certain points which we have carefully considered. The Commission is grateful to them for their co-operation.²⁰

At this point, it is alright to discuss that some of the issues which fail fail for contemplation have been dispensed with by the Law Commission in its Report on the Penal Code and in its Report on the Indian Evidence Act, wherein few suggestions were made for the reformation of the law. We shall make a reference in detail to those suggestions, and also designate or specify our opinions or interpretations as to whether any further changes in the law are required.

7. Conclusion

The laws concerning the sexual offences does not have any consistency or a structure. Much of it shows the social outlooks towards the sexual performances and the roles of men and women of the latter part of the nineteenth century, when the common law of that era was methodised or coded. The Draft Sexual Assault in relation to rape and buggery, it has essentially been overhauled by statutory amendments. In relation to other sexual offences, it reiterates the law with certain considerable amendments which include proposals of the Criminal Law Revision Committee. Those will be represented to at the suitable opinions in this study.

The alteration in social outlooks since the nineteenth century requires the major fundamental remodelling of sex offences of law in order to produce reasonable and clear protection from any sort of sexual abuse and mistreatment and to accomplish a fair and forbearing or broad-minded society in accordance with the ECHR and the Human Rights Act 1998.²¹

It is frequently specified that a woman who is raped experiences two crisis—the rape and the succeeding trial. While the first completely abrades her dignity, curtails her individuality, abolishes her sense of security and may frequently devastate her physically, the second is no less potent of mischief, inasmuch as it not only compels her to re-live through the distressing experience, but also does so in the glare or lookout for publicity or promotion in a totally outlandish atmosphere, with the whole machinery and paraphernalia of the criminal justice system concentrated upon her.

¹⁷Criminal Law (Amendment) Act, 1983

¹⁸*Superintendent and remembrancer of legal affairs, west bengal v. satyen howmick and others* AIR 1981 SC

¹⁹Ibid note 13.

²⁰<http://www.lawcommissionofindia.nic.in/rapelaws.htm>, last visited on 30th January 2019.

²¹<https://rostrumlegal.com/journal/the-the-need-for-restorative-justice-approach-to-sexual-offences-in-india/>, last visited on 3rd February 2019

In particular, it is a very well established fact that sexual activities with the adolescent girls of immature age have a very disturbing result which often perseveres throughout the life, leading consequently to various illnesses, unless there are some counter-balancing causes in the family life and social outlooks which could act as a support system against such tracherious effects or consequences.

Rape is anyway the 'ultimate violation of the self'. It is a very torturous and humiliating event /occurrence in a woman's life which subsequently leads to fear for existence and an uncomfortable sense of powerlessness. The victim in turn needs a lot of empathy, emotional support and safety and a sense of re-assurance. In the absence of public compassion to any such needs, the experience of figuring in a report of the offence, may itself become another potential assault.

Forcible rape is an uniquely overwhelming one among all other crimes, in such a manner in which its victims are dealt with or deservingly punished by the criminal justice system. Raped women have to undergo certain hardships at the hands of the society and the judicial system also. These begin with their mis treatment and unnecessary judgement or character assassination by the police and continue through a male-dominated criminal justice system. Acquittal of many de facto guilty rapists however adds on to the sense of injustice.

However, the focus of the law upon corroboration, consent and character of the victim and a standard of proof of guilt going way beyond a logical and reasonable doubt, have resulted in an increasing distancing or separation of the general public from the established legal system, who find the law and the legal language quite difficult to understand and who in turn think that the Courts are not functioning as good as it is expected to function.

8. Suggestions

8.1 Media sensitivity

After the advent or arrival of the social media, the reporters and the various channels of news, media are not the only sources for publishing or broadcasting the information. Now any person who is invited to speak about the sexual assault can deliberately contribute to society's knowledge of the phenomenon. Media coverage of crimes, including sexual assaults, has an impact on the knowledge, beliefs, attitude and behaviours of the public regarding such happenings. According to the experts, the prevention of violence and sexual assaults requires taking actions against such societal norms and the Media has a huge role to play in that. So, by having a sensible coverage of a wide variety of such events, media can spread awareness about what all come under the crimes against women and why such things are unacceptable. Also, what all steps can be taken to eradicate such mishappenings in our society.

8.2 Judicial sensitivity

Our Courts shoulder a huge responsibility in dealing or trying an accused of sexual offence. They must deal with such cases with prime concern and utmost sincerity and sensitivity. Already the victim or the survivor has gone through a lot of agony and misfortune, on top of it if they are even let down by the criminal justice system of our country, then what is the use of having such a system. According to legal experts, one of the biggest hurdles in achieving justice for rape survivors is the protracted trials. India does not have sufficient courts, judges and prosecutors which results in huge backlog of cases. Apart

from these, there are instances where the victims are forced to have or accept the illegal 'out of court' settlement and also the family or the community forcing her to get married to her rapist which is absolutely unacceptable. So in order to eradicate such events, our courts and judicial system in overall procedure of trial, be sensitive and keep in mind the interest of the victim.²²

8.3 Training programmes and special courts

The Government has to set up fast-track Courts for the trial of rape cases in a speedy manner. Inadequacy of the current procedural laws lead to prolonged trial which in turn result in low conviction rate which ultimately defeats the fundamental right of the victim to live with dignity and integrity. Speedy trial will definitely result in reduction of rape cases against women and would meet ends in justice. So special courts for rape trials are the need of the hour as justice delayed is justice denied. Moreover, speedy trial is the essence of our criminal justice system.

Also, the government should establish more and more number of rehabilitation centers and training centres for the sex offenders. They can be trained about how to practise good in the community once out in the society. Plus, more awareness should be spread about how to minimise the offences against women and thus make this world a better place to live in.

8.4 Restorative Judicial Approach

Restorative justice is an embryonic reform movement and may be described as a normative theory of criminal justice. It is a way of referring to crime as much more than a mere act of infringement of the law but also as a source which harms the people, their relationships, and the whole public at large. The theory of restorative justice majorly focuses on repairing the harm caused or exposed to by the criminal behavior. This growing response to crimes respect the dignity and equality of each person, develops the understanding, and also promotes the factor of social harmony. However, restoration is mainly achieved through a deliberate procedure, in which all the people who are affected by the crime have an opinion on the resolution, rather than it being determined solely by a judge. Restorative Justice is based on the belief that when an offender is willing to acknowledge wrongdoing, is willing to be responsible for his actions, is willing to make reparations or compensations to those he has injured, and is willing to take corrective action, then societal forgiveness and restoration or rehabilitation should take place. It can be achieved through supportive procedures that comprises of recognising or categorising then and taking further steps to repair the harm caused, involving all the stakeholders, and thus transforming the traditional or earlier correlation between the groups and their Governments in responding or reacting to the crime. This is a new way forward. A chance should be given to the offender if he wants to correct his behaviour and serve the society in a good manner as his corrective step for his wrongdoing.

²²Supra note 20.